



The Facts Speak for Themselves: A Fundamentally Different Superfund Program

Overview

Since Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or “Superfund”) in 1980, many concerns have been raised about the program. Through a series of initiatives, the Agency addressed those concerns and has fundamentally reformed the program. This document sets forth the facts about many myths related to Superfund, and describes the significant accomplishments of the Superfund program.

Summary of Significant Accomplishments:

- EPA has initiated or completed construction activity (rapid action or long-term cleanups) at 70% of the sites on the National Priorities List (NPL).
 - EPA has completed construction at over 400 sites – 29% of the sites on the NPL.
 - Construction is currently underway at another 485 sites – 35% of the sites on the NPL. (At approximately 7% of the sites on the NPL, construction has been completed at a portion of the site, but continuation of the construction is not currently underway.)
- Ninety-five percent of the Superfund sites on the NPL have started a phase of cleanup.
- EPA has taken rapid cleanup action at more than 3,000 hazardous waste sites.
- EPA has established a nationwide, risk-based priority system for allocating Trust Fund monies to clean up sites.
- Responsible parties perform more than 75% of Superfund long-term cleanups, saving taxpayers more than \$12 billion.
- The average cost of Superfund cleanup construction projects has decreased by \$1.2 to \$1.6 million over the past two years.
- EPA continues to promote fairness in the Superfund enforcement program by reaching settlements with more than 12,000 small parties.
- EPA now, as a routine practice, offers orphan share compensation to settling parties at negotiations for long-term cleanup.
- Of the over 40,000 sites in EPA’s database, EPA has conducted evaluations at more than 38,000, or 95% of all sites reported to EPA.



A Faster, Fairer, More Efficient Superfund

MYTH

Administrative Reforms have done nothing to make the program fairer for parties paying for cleanup.

FACT: Orphan share compensation is now routine practice—EPA has offered over \$57 million in orphan share compensation this year alone.

In fiscal year 1996, EPA has offered over \$57 million in past costs and projected oversight costs to compensate settling parties for a portion of the orphan share (costs attributable to defunct or insolvent entities). **To increase fairness beyond this initiative, EPA has requested a dedicated, additional legislative appropriation to adequately fund the payment of the orphan share at sites where potentially responsible parties (PRPs) are currently obligated to shoulder these costs.** In the absence of such an appropriation, EPA has sought to administratively provide some orphan share compensation, within the constraints of funds currently available for cleanup work, and without affecting the pace of cleaning up sites. This compensation is being offered to settling parties at every negotiation for long-term cleanups where orphan shares exist, and where PRPs of a site include at least one PRP that is not an owner or operator.

Critics state that the administrative reform provides no real relief to liable parties, but merely a forgiveness of oversight costs, which is of little real value to parties paying for cleanup at Superfund sites. However, in addition to relieving parties from a portion of oversight costs, compensation offered provides relief from past costs as well. **Relief from “past costs” constitutes real relief from the payment of some cleanup costs that a viable, identified party would otherwise have to pay for.** The forgiven costs relate to work already performed, and the parties get the benefit of not performing or paying for this work. Thus, forgiving past costs and oversight costs constitutes a “real” savings for settling parties, as it translates into actual dollars, already spent, which would otherwise have to be repaid.

FACT: EPA's reforms are getting thousands of small contributors out of the liability system, including over 12,000 *de minimis* parties.

Transaction costs arise mostly from contribution lawsuits ("third party" suits brought by parties at a site against each other), not from EPA lawsuits. Often these suits are brought against parties who are not pursued by EPA because of their extremely limited contribution of hazardous substances (*de minimis* or *de micromis* contributors), or their limited ability to pay for cleanup. Through guidance, policy, and settlements, EPA has reduced the opportunity for contribution litigation, thus reducing the associated transaction costs, by providing contribution protection to *de minimis* parties, to *de micromis* parties, as well as to parties with a limited ability to pay. **To date, over 12,000 *de minimis* parties have been protected from the risk of contribution actions.**

EPA model settlement documents provide that settling parties must waive their right to seek contribution from these categories of parties. **By eliminating the opportunity for parties to sue contributors of extremely small amounts of hazardous substances and parties unable to afford to pay for cleanup, EPA removes these small contributors from the liability scheme, early and with substantially reduced costs.**

FACT: Litigation will be reduced at sites where a fair-share allocation is undertaken.

EPA is promoting the use of allocations to distribute cleanup costs fairly among parties that settle. Equitable distribution of responsibility through an allocation process will reduce litigation, in that settling parties would be agreeing not to seek contribution. **Because parties will contribute only their equitable share, the incentives to sue for contribution disappear.** Third party litigation will be almost entirely eliminated for parties signing on to a settlement that is the result of an allocation. Thus, non-settlers will be pursued by EPA and not by PRPs.

MYTH *EPA still unfairly issues orders only to a few “deep pockets” to perform cleanups.*

FACT: It is EPA’s policy to thoroughly document its reasons for excluding a PRP from any unilateral administrative order issued by the Agency.

EPA seeks to hold responsible the largest manageable number of PRPs at a site after consideration of such factors as financial viability and strength of liability evidence, not simply those with the “deepest pockets.” Under EPA’s negotiation and settlement approach, **the Superfund program has evolved from a primarily Fund-financed cleanup program, to a program where over 80% of the long term cleanup actions are financed by responsible parties.**

Where parties don’t agree to voluntarily clean up a site, it is sometimes necessary for EPA to issue UAOs (unilateral administrative orders) under CERCLA §106 to accomplish the cleanup. **To address the persistent myth regarding EPA’s “selective” issuance of UAOs, EPA issued a memorandum on August 2, 1996, establishing new procedures to assure that EPA’s policy of issuing UAO’s to all financially viable, liable parties, is being followed.** The procedures require the Regions to document their reason(s) for not issuing UAOs to certain parties (such as charitable organizations and homeowners). This documentation will facilitate an internal management review of the issuance of UAOs. Furthermore, incentives for settlements, such as orphan share compensation, should reduce the need to issue UAOs in the future.

MYTH *EPA has done nothing to make the program faster, and Superfund cleanups take too long to complete.*

FACT: In an effort to speed the pace of cleanups, EPA is implementing the “presumptive remedies” reform at Superfund sites, which, when fully implemented, could cut study times in half.

Certain categories of sites have similar characteristics. For example, approximately 20% of the NPL sites are municipal solid waste landfills. These landfills often have similar contaminants, affect similar environmental media, and can be addressed in similar ways. Now, the program groups proven cleanup techniques into sets of responses, known as presumptive remedies, appropriate for specific types of sites, contaminants, or both.

Presumptive remedies help streamline removal actions, site studies, and cleanups; reduce the cost and time required to clean up similar types of sites; and ensure consistency in remedy selection. The use of presumptive remedies improves the efficiency of the Superfund process by building on past program experience.

CASES IN POINT: EPA now has results from several sites which have implemented the presumptive remedy for municipal landfills. When compared to several “control” sites, with similar characteristics, the RI/FS time savings estimated for the average pilot site was 23 months. Examples of how these savings were achieved:

At the BFI/Rockingham Site, available, useable ground water information clearly indicated that a ground-water risk existed. EPA was able to avoid spending time and resources conducting extensive and redundant sampling to characterize the waste at the site. Rather, a presumptive remedy was used, i.e., a cap along with a leachate and gas collection system. The result allowed initiation of the source control action just 12 months after the start of the Remedial Investigation/ Feasibility Study (RI/FS). The entire RI/FS for the site took 23 months, as compared to control sites with similar characteristics, which took 47 months under the traditional process.

At the Lexington County Landfill Site, the Superfund action was based on ground water sampling in which levels exceeded the maximum contaminant level (MCL). The strategy for the site’s remedial investigation included focused sampling to further characterize the ground water contamination and a streamlined risk assessment. Use of the presumptive remedy approach resulted in elimination of planned soil sampling and analysis to calculate risks, and a planned search for drums whose exact location, quantity and type of wastes were unknown. The design of the containment remedy accounted for the uncertainties in the nature of wastes in the landfill. The result was an RI/FS with a 28 month duration, compared to control sites with similar characteristics, whose RI/FS duration was 44 months under the traditional process.

FACT: Including rapid cleanups, EPA is responsible for over 4,500 successful cleanups at Superfund sites across the country since the program’s inception.

EPA has used its rapid action cleanup authority to accomplish many accelerated cleanups at time-critical hazardous waste sites. **To date, approximately 3,800 emergency actions at over 2,990 Superfund sites (and approximately 700 long-term cleanup actions) across the nation have been completed.** These actions accelerate the overall cleanup process by quickly addressing significant and imminent threats to the public health and environment. In recent years, EPA has implemented reforms which streamline this process.

FACT: The expiration of the taxing authority may affect the pace at which sites are cleaned up, and impacts EPA's authority to fund orphan shares at Superfund sites.

When Congress allowed the Superfund tax to expire at the end of 1995, it put a halt to the approximately \$4 million per day that was generated for Superfund cleanups. Though there is still a positive balance in the Superfund Trust Fund, **without some certainty as to if or when the tax will be reinstated, EPA will need to make hard decisions in the near future to plan for cleanups without the availability of this Fund money.** In the event that EPA must begin incrementally funding Superfund sites, it is likely that cleanups will be delayed.

In addition, the Superfund Trust Fund must be maintained to provide the ability to increase orphan share funding in conjunction with legislative authority to do so without affecting the pace of cleanups. EPA has sought from Congress special funding for orphan share liability relief at Superfund sites. **Although EPA is currently funding the orphan share at several sites, until the time that such funding is made available by Congress, and Congress extends the taxes supporting the Superfund Trust Fund, EPA will be unable to provide the level of orphan share funding necessary to substantially improve fairness throughout the program.**

FACT: Congressional proposals would have significantly affected the reliability and pace of cleanups through the reopening of past cleanup decisions, the intervention of lawyers into the cleanup process, and the failure to treat ground water as a valuable resource.

The major Superfund bills introduced in the 104th Congress would have reopened some past cleanup decisions, and allowed for judicial review of some cleanup decisions. These provisions would have had significant effects on the current pace of cleanups, as **cleanups would stop while the lawyers attempted to argue about what the cleanup should be at a particular site.** In addition, reopening cleanup decisions could undermine a community's input on past cleanup decisions. EPA strongly opposes any proposal which would affect the pace of cleanups in this manner.

The limited "quick fixes" that critics propose cannot provide reliable protection to public health and the environment over the long term. EPA encourages revising cleanup decisions when good science on emerging technologies will save time and money, while also achieving an equivalent protection of public health and the environment. Without assurances for equivalent protection, "cheaper" cleanups implemented solely on the basis of cost savings wind up being more expensive to future generations, who must later face this contamination. **Shortening cleanups by "writing off" America's ground water resources is an unacceptable solution to the Superfund problem.**

MYTH

EPA's reforms have done nothing to control the costs of cleanups at Superfund sites.

FACT: The average cost of Superfund cleanup construction projects has been reduced by \$1.2 to \$1.6 million per project by EPA's efforts to improve the Superfund program.

For the years following passage of the Superfund Amendments and Reauthorization Act (SARA) and prior to full implementation of Administrative Reforms, **the average Superfund cleanup construction project cost (one indicator of program costs) decreased by \$1.2 to \$1.6 million per project over the last two fiscal years. This indicator has dropped over the past two fiscal years to \$10.0 million.** It is important to note that these savings still reflect cleanups which are protective, and continue the mandate for "permanence" and treatment of waste, as described in the current Superfund law. All of the administrative initiatives, when fully implemented, will continue to contribute substantially to program improvements and further reductions in cleanup costs.

FACT: EPA has implemented cost controlling reform measures such as the National Remedy Review Board.

The Remedy Review Board is a board of technical and policy experts within EPA that will review high cost long-term cleanups prior to a Record of Decision (ROD) being signed. **The Remedy Review Board reviewed 12 sites in FY 1996, and EPA expects an average savings of about \$1 million per site.** Continued use of the Board will continue to control cleanup costs at large, complex Superfund sites across the nation.

FACT: EPA reforms provide a mechanism for updating cleanup decisions at many Superfund sites, which will control costs.

Where technology has advanced and adequate levels of public health and environmental protection are assured, EPA will update remedies in order to reduce costs. For example, at many sites where costly ground water remedies have been implemented at sites where DNAPLs exist, **updated technologies and cleanup advancements may be implemented instead of the original remedies to achieve a cost savings.**

CASE IN POINT:

At the Davis Liquid Waste Superfund Site in Smithfield, Rhode Island, the cleanup called for the excavation and on-site incineration of approximately 25,000 cubic yards of contaminated soils and wastes. EPA also evaluated the use of thermal desorption for cleaning up the soils and waste at the site, but could not select this technology at the time the cleanup decision was made due to limited information available on the cost and full-scale performance of this technology. Since that time, however, there has been extensive information gathered on the technology at other Superfund sites. The technology has been shown to be very effective in cleaning up the wastes present at this site. Based on the successful performance of this technology and updated cost information, EPA has updated its incineration cleanup to instead use on-site thermal desorption as the means of treating contaminated soils and waste at the site. The use of the updated technology will be protective of human health and the environment and will significantly reduce the overall cost of this component of the cleanup.

FACT: Nearly 70% of all Superfund resources go to actual cleanup activity (i.e., direct cost).

Overhead costs of Superfund are low, especially when compared to private sector, non-Superfund-related, industries performing similar work (e.g., consulting and construction). In these industries, less than 60% of total costs are spent on direct costs. The 30% spent on indirect cost provides EPA “support activities,” such as contract management and oversight of large cleanup contracts, research into innovative cleanup technologies, site health assessment, public outreach, and enforcement costs. While critics of this spending argue that it is not critical to the cleanup of these sites, **it is critical for EPA to investigate the risks, inform the public of the risks posed by these sites, and ensure that the Superfund resources are spent wisely.** Without these “support services,” actual cleanup would never take place.

Many critics claim that EPA spends too much money on lawyers. **It is this enforcement spending, however, which ensures that private parties at Superfund sites commit over \$7 towards cleanup for every \$1 allocated to enforcement.**



Cleanups Not Hindered by Lawsuits

MYTH *Legal disputes delay cleanups.*

FACT: CERCLA's "pre-enforcement" review bar prevents parties from stopping cleanup work at Superfund sites.

Although Superfund has been criticized for the numbers of lawyers involved, Superfund has been able to keep the lawyers out of the cleanup pipeline. When addressing human health and environmental concerns at Superfund sites, attorneys have very little impact on the pace of cleanups and cannot delay cleanup actions. CERCLA's current bar of judicial review prevents parties from suing to stop work at a site or having a court review EPA's cleanup decision until much later in the process. **EPA can thus concentrate on cleanups, rather than defending endless lawsuits.** Also, under §113 of CERCLA, when the EPA compels one or more PRPs to clean up a site, the PRPs are prohibited from challenging EPA's actions in court until later in the process — although PRPs are not prevented from suing each other for contribution. These third party contribution lawsuits must, however, take place on a *parallel track* to the site cleanup. Thus, **cleanup of a site is *not* delayed due to third party contribution lawsuits.**

After assessing the delays arising from pre-enforcement review, the September 1994 GAO Report to Congress concluded that, "with few exceptions, the statutory limits [on judicial review] appear to have accomplished the Congress' goal of ensuring that EPA's cleanup activities are not hindered by legal challenges." EPA's authority under CERCLA allows EPA to order responsible parties to do the cleanup work. Thus, **EPA has the ability to clean up sites without having to spend years in court deciding whether someone can or cannot do the cleanup.** Lastly, if someone refuses to do the cleanup, EPA can move in using the Trust Fund and do the cleanup itself and then later sue to recover the appropriate contribution from parties.

FACT: An Inspector General (IG) report used to show that EPA's liability scheme delays cleanups is based on 3 sites, selected for their extreme delays, and as the IG stated, cannot be used to draw conclusions about the program as a whole.

Recently, critics have used an Inspector General (IG) report as evidence to show that the liability scheme leads to delays in cleanup at Superfund sites. **However, the IG study used only 3 case studies (out of 1,297 sites), identified because they had encountered significant delay in implementing cleanup.** Some of the delays identified in the report "were completely outside EPA's control."

Thus, the limited scope of the report prevents drawing any conclusions about the existence and extent of delays at other sites. For example, although the report identified four sets of settlement negotiations as lengthy, which delayed cleanup, the report fails to make any comparison with the eight other instances in the study where settlement negotiations took place and apparently did not delay cleanup. **The IG merely intended to identify areas that likely merit additional study in the future.** The IG report cannot be used to draw any conclusions about the current Superfund program.



MYTH

The Administration is attempting to federalize successful State brownfields programs.

FACT: The U.S. Conference of Mayors supports Federal government involvement in the redevelopment of brownfields.

The enormity of the brownfields problem has attracted the national spotlight. **According to the U.S. Conference of Mayors, brownfields have been identified as the number one environmental issue in the nation today.** With an estimated 450,000 contaminated commercial and industrial sites across the country, the Conference of Mayors has urged the Federal government to invest in the future of cities by supporting the cleanup and redevelopment of brownfields (see GAO\RCED-95-172, June 1995). At the January 1996, Conference of Mayors Winter Meeting, Mayor Rice of Seattle, stated that "Mayors applaud EPA's current effort to improve the Agency's responsiveness to local governments." They urged the Federal government to develop a comprehensive redevelopment strategy to assist cities.

FACT: Brownfields Pilots are encouraging redevelopment.

The Brownfields Pilots (76 sites funded up to \$200,000 in 1995 and 1996) are intended to generate further interest in brownfields by bringing together public and private efforts by Federal, State, and local governments. The success of these pilots will encourage others to take steps toward brownfields redevelopment, too. Stakeholders tell the Agency that brownfields redevelopment activities could not have occurred in the absence of EPA efforts. Institutions such as the Bank of America, the National Community Reinvestment Coalition, and others attribute new interest and enthusiasm for brownfields redevelopment directly to EPA's policies and efforts to focus attention on this issue. **As the National Community Reinvestment Coalition said "...we wholeheartedly support the EPA's Brownfields Economic Redevelopment Initiative.** NCRC believes that [EPA's] multifaceted initiative represents a significant step forward by the Administration in working with distressed communities on the local level in their revitalization efforts." (NCRC represents 500 member organizations from all 50 states.)

The successful revitalization of brownfields properties requires Federal, State, Tribal, and local governments working with private parties and non-profit organizations. However, the absence of clear, coordinated programs across Federal and State lines has frustrated redevelopment of brownfields sites. **To provide effective technical and financial support to states and municipalities looking to cleanup and redevelop potentially contaminated urban properties, EPA and other Federal agencies are working together to coordinate not only the environmental, but also the development and financial assistance expertise available at the Federal level.**



MYTH *EPA's involvement in State Voluntary Cleanup programs is not beneficial to States.*

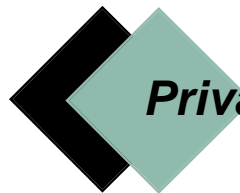
FACT: EPA will provide \$10 million in FY 1997 to support development of State programs.

EPA recognizes the important role that State environmental agencies have in encouraging economic redevelopment of brownfields. Administrator Browner supports legislation that encourages the development of State-run voluntary cleanup programs. Indeed, **State voluntary cleanup programs have succeeded in encouraging private party cleanup of lesser contaminated properties** and these programs augment the Federal funding of pilots. EPA also plans to provide \$10 million in FY 1997 to further encourage the development of these State programs.

FACT: States have signed MOAs with EPA regions for further development of State Voluntary Programs.

Over the last few years, several States and Regions signed Memoranda of Agreement (MOAs) concerning their State voluntary cleanup programs. These MOAs reflect each party's understanding of how they will work together to best utilize their respective resources in addressing the universe of contaminated sites in this country. **Some States and private parties have expressed the opinion that these MOAs are useful in helping to promote the cleanup and redevelopment of brownfields sites.**

EPA and States began developing a guidance for State voluntary cleanup programs to share and communicate successful approaches that certain States and Regions had developed through their MOAs. While people recognize the variability among State voluntary cleanup programs, they were interested in learning the minimum elements a State voluntary program usually has, and what States and Regions were including in their MOAs. The guidance is under development and EPA will continue to work with States and other Federal agencies to establish a baseline for the voluntary programs.



Private Investment in Brownfields

MYTH

The Brownfields Tax Incentive Plan would provide tax incentives for the redevelopment of low-risk brownfields diverting monies collected from industry for the nation's most contaminated properties.

FACT: The Tax Incentive would leverage \$10 billion in private investment.

The March 11, 1996 new tax incentive announced by President Clinton is intended to spur the cleanup and redevelopment of brownfields. In essence, it builds on the 1994 IRS ruling which concluded that certain costs incurred to clean up land and groundwater were deductible as business expenses. That 1994 ruling **ONLY** addressed cleanup costs incurred by taxpayers who contaminated the land. In other words, it helped the polluter. The 1996 Tax Incentive levels the playing field by benefiting the prospective purchaser or owner who seeks to put this property to new and productive use.

The Treasury Department calculated the off-sets before this incentive was announced last March. The \$2 billion will be fully paid for under the President's seven year balanced budget and **is expected to leverage \$10 billion in private investment and return an estimated 30,000 brownfields sites to productive use.**

In addition to the tax incentives, it is important to note other economic benefits to redevelopment, such as the finding by the Army Corps of Engineers that **over 20 new jobs are created for every \$1 million of funds spent cleaning up America's hazardous waste sites.**



CERCLIS Archive Helps Redevelopment

MYTH

Removal of 27,000 sites from the Superfund inventory has had no effect on the removal of legal obstacles to brownfields redevelopment.

FACT: The deletion of sites from the active CERCLIS inventory has been praised by both banks and cities.

EPA has deleted these sites from the active CERCLIS inventory. The creation of an archive file of the deleted sites has been praised by both banks and cities. EPA sent a letter to 200 mayors with an attached list of sites in their cities that have been archived. For example, Buffalo, New York had a Republic Steel site removed from CERCLIS. ATDM Corporation, in partnership with Village Farms of Buffalo, are cleaning a portion of the site for use as a hydroponic tomato farm. This new business will employ approximately 300 workers from the immediate area.

The movement of sites to the CERCLIS archive file has lent itself to providing opportunities for redevelopment. Cities and financial institutions are currently using the names of archived sites for consideration of redevelopment. This action on the part of the Agency has enhanced efforts to assess, clean up, and redevelop brownfields properties. Banks and financial institutions endorsed the deletion of these sites from CERCLIS and have acted with renewed confidence to reclaim these properties for active use. They have stated that it has had a positive impact on the redevelopment of properties.